Office-Supreme Court, U.
FILED
NOV 28 1951
CLERK

In the Supreme Court of the United States

October Term, 1950

No. [redacted] 76

P. G. Taylor, Reuben Foster, Henry W. Bovard, R. W. Harris, W. E. Hilsinger, Fearon Dodson, D. J. Waite, Hamilton Smith, P. G. Peterson, Wyne Blackwell, Individually and Doing Business as Sawyer & Foster, and Sawyer & Foster, a Partnership,

Petitioners,

vs.

John E. Russell and Wilma Russell,

Respondents,

and

Tucson Gas, Electric Light and Power Company, a Corporation, and The Industrial Commission of Arizona, a Public Agency,

Intervenors Below.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof

Gerald Jones,
of Conner & Jones,
1000 Valley National Building,
Tucson, Arizona,

Counsel for Petitioners.

SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1
Opinion of appellate court	2
Jurisdiction of U. S. Supreme Court	2
Summary statement of matter involved	3
Questions presented	6
Reasons relied on for allowance of writ I, II, III	7
Certificate of counsel	9
Brief in Support of Petition	10
Argument on Reason I (Facts show Identical Employ) for allowing writ	10
Argument on Reason II (Facts show Election of Remedy) for allowing writ	11
Facts invoked in Reason II	20
Remedy through Arizona Supreme Court	21
Argument on Reason III (Jury Question) for allowing writ	24
III (a) Identical Employ, right to jury	24
The jurisdictional question	25
III (b) Election of Remedy, Right to Jury	31
III (a) and (b) Right to jury on both matters	31
III (c) Right to jury on both issues as guaranteed by seventh amendment to United States Constitution, and Rules of Procedure	32
Conclusion	34

TABLE OF AUTHORITIES CITED

Cases	Pages
American Stevedores v. Porello, 330 U.S. 446, 67 S.Ct. 847, 91 L.Ed. 1011	18
Behringer v. Inspiration C. C. Co., 17 Ariz. 232, 149 P. 1065	26, 27
Bradley v. Ind. Com., 51 Ariz. 291, 76 P.(2) 745	19
Consolidated Arizona Company v. Ujack, 15 Ariz. 382, 139 P. 465	12, 16
Cooper v. Reynolds, 10 Wall. 308, 19 L.Ed. 931	26
Dimick v. Schiedt, 293 U.S. 474; 55 S.Ct. 296, 70 L.Ed. 603, 95 A.L.R. 1150	33
Erie Railroad Company v. Tomkins, 304 U.S. 64	24, 31
Haggard v. Industrial Com.—Ariz.—223 P(2) 915 (Nov. 1950) See Syl. 13	11
Industrial Com. v. Byrne, 62 Ariz. 132, 134, 155 P(2) 784	11
Industrial Commission v. Nevelle, 58 Ariz. 325, 119 P(2) 934	13
Johnsen v. American Hawaiian SS, 98 Fed.(2), 847 (9th Circuit, 1938)	17
McNutt v. General Motors, A. C. 298 U.S. 178; 80 L.Ed. 1135; 50 S.Ct. 780	34
Moseley v. Lily Ice Cream Co., 38 Ariz. 417, 300 P 958	13
Mounce v. Wightman, 30 Ariz. 45, 243 P. 916	32
Red Rover Copper Co. v. Ind. Com., 58 Ariz. 203, 118 P.(2) 1102, 137 A.L.R. 740	19
S. H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 P(2) 931	12, 22
State v. Phelps, 67 Ariz. 215, 220, 193 P(2) 921 at 925	25, 26
Stukey v. Stephens, 37 Ariz. 514, 295 P. 973	32

Pages

Toomey v. Waterman S. S. Corp., 123 F.(2) 718 (C.C.A. 2)....18, 19

Weaver v. Martori, 69 Ariz. 45, 208 P(2) 652.... 12

STATUTES

Arizona Code Annotated, 1939, Sections 56-949 and 56-950 ....3, 4, 7, 13, 14, 16, 19, 20, 23, 24, 28
Arizona Constitution, Art. 18, Sect. 6....12, 13, 24
10 F.C.A. Title 33, Sect. 933.... 17
Rules of Civil Procedure, Rules 38 and 39.... 8
44 Stat. 1440, C. 509.... 17
28 U.S.C. Sec. 1254.... 2
28 U.S.C. 1332, 1441.... 3
28 U.S.C. 1359 and 1447.... 33
U. S. Constitution, Seventh Amendment.... 8, 32
U.S.C.A., Title 28, Section 80.... 33
33 U.S.C.A., Sect. 933.... 17

TEXTS

6 A.L.R. (2), page 14, note 10.... 16
57 C.J.S., page 151.... 34

Counsel of Record

GERALD JONES
of CONNER & JONES
303-8 Valley National Bldg.,
Tucson, Arizona.

Counsel for petitioners who were defendants in district court and appellants in court of appeals.

UDALL & UDALL,
408 Valley National Building,
Tucson, Arizona.

Counsel for respondents who were plaintiffs in district court and appellees in court of appeals.

H. S. MCCLUSKEY,
Arizona State Building,
1640 West Adams Street,
Phoenix, Arizona.

Counsel for intervenors—Intervenors in district court and separate appellants below.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,
Petitioners,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,
Respondents,

and

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,
Intervenors Below.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners named in the caption above, and each of them, being appellants in the court below, the intervenors being separate appellants there also, respectfully pray for

a writ of certiorari to the United States Court of Appeals for the 9th Circuit to review the decision and judgment of that court rendered March 14, 1951, affirming the judgment of the United States District Court for the District of Arizona for respondents, being appellees below, against petitioners in a certain suit at common law for personal injuries to Appellee John E. Hubbell (called herein appellee and plaintiff) catalogued in that Court as No. Civil 540 Tucson wherein the appellees were plaintiffs, these petitioners, for convenience called Sanderson and Porter, were defendants and the above named, Tucson Gas, Electric Light and Power Company (herein called Power Company), and the Industrial Commission of Arizona (herein called Commission), were intervenors, and the order of said Circuit Court of Appeals entered May 8, 1951, denying these petitioners' petition for a rehearing.

OPINION OF THE APPELLATE COURT

The Court of Appeals for the 9th Circuit Court rendered an opinion on the date above-mentioned. It has not yet been reported. It appears in the transcript of record in that part devoted to proceedings in said Circuit Court of Appeals (R 213).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This Court has jurisdiction to review the said decision and judgment of the Circuit Court of Appeals under 28 U.S.C. Sec. 1254.

An order was made by the Court of Appeals on May 9, 1951 staying issuance of mandate to and including June 12, 1951 conditioned upon the filing of this petition in this Court within the time last mentioned.

SUMMARY STATEMENT OF MATTER INVOLVED

Appellees are husband and wife. They filed an action in the Superior Court of Pima County, Arizona, at Tucson, against these petitioners, Sanderson and Porter, a partnership, for personal injuries to appellee John Hubbell allegedly due to the negligence of the defendants in permitting conductors to be charged with high voltage of electricity without warning to the appellee, who came in contact therewith to his personal injury. Defendants removed the action on the basis of diversity of citizenship, 28 U.S.C. 1332, 1441, to the United States District Court for Arizona at Tucson, Arizona. Thereafter the Industrial Commission of Arizona, a public agency, and Tucson Gas, Electric Light and Power Company, the employer of Appellee Hubbell, intervened as defendants.

Under the Constitution and laws of the State of Arizona and particularly Sections 56-949 and 56-950, Arizona Code Annotated, 1939, hereafter referred to as A.C.A. 1939, see appendix, an employee entitled to compensation from his employer for an injury due to "the negligence or wrong of another not in the same employ" • • • "shall elect whether to take compensation or to pursue his remedy against such other." If he elects to take compensation, his course of action against such other is automatically assigned to his employer's insurance carrier. If he elects to sue such other, he may nevertheless demand compensation for "the deficiency between the amount actually collected and the compensation provided or estimated herein for such case." (see 56-949). Acceptance of compensation benefits or application for an award constitutes a waiver of the right to institute an action in court against such other party (see Sect. 56-950).

Appellee was an employee of Power Company at Tucson, Arizona. For his injuries due to the accident on June 14, 1950, he was entitled to compensation from the Commission, his employer's insurance carrier.

He brought this suit against Sanderson & Porter as persons "not in the same employ" as himself who had allegedly from negligence caused his injuries (56-949).

In his complaint he took the affirmative on the two issues mentioned (for convenience we will call them independent contractors or perhaps better "identical employ," to use the apt expression of the Court of Appeals and election of remedy) (R 7, 11).

The defendants moved to dismiss the complaint upon a number of grounds (R 25). Thereafter, the Power Company and the Commission were allowed to intervene, by consent of the parties (R 51), and they took the position that plaintiff had elected to accept compensation from the Commission; that defendants were not independent contractors; and that plaintiff should be required to accept the benefits afforded him by the Workmen's Compensation Law. Intervenors also filed a motion for summary judgment (R 48), reaffirming their position, and therein your petitioners joined (R 55).

All motions being overruled, the defendants, your petitioners, filed an answer putting in issue negligence, whether they were independent contractors, the election of remedy by the plaintiff, and contributory negligence (R 56). The intervenors filed an answer raising the issues of election of remedies and identical employ (R 27).

At the trial the plaintiffs took the position that the undisputed evidence showed that Sanderson and Porter were

independent contractors and that the plaintiff had not made an election of remedies. These petitioners, at the close of the plaintiff's case (R 124) and at the close of the entire case (R 142) moved for instructed verdict on the grounds that the undisputed evidence showed that Sanderson and Porter were in the same employ with the plaintiff and that plaintiff had elected to take compensation. The intervenors took a position somewhat similar to that of these petitioners (R 126, 144).

Just before the case went to the jury, the Court announced that the only questions for the jury were the issues of negligence and contributory negligence (R 149), refused instructions requested by defendants (R 75) on the issues of election of remedy and identical employ; and charged the jury on the issues mentioned only.

Verdict went for appellees (R 79), on which judgment was entered (R 80). Thereafter the defendants renewed their motion for instructed verdict (R 84) and moved for a new trial, setting up, among other things, the refusal of the court to charge the jury on the issues mentioned (R 88), which said motions were denied (R 91, 92).

In the Court of Appeals the defendants (petitioners) did not attack the verdict of the jury on any ground concerning negligence, contributory negligence or the amount of the verdict, but did challenge the judgment of the district court on the grounds: that the undisputed evidence showed they were not independent contractors and that the plaintiff had made a binding election to accept compensation; and also that if there were a dispute in the facts as to these issues, or either of them, they should have been submitted to the jury (R 196); that said right existed under the Fed-

eral Constitution and statutes as well as the Arizona constitution and laws (R 198, 202).

In the Court of Appeals counsel for the appellees took the position that the undisputed evidence did show that the defendants were independent contractors and that the appellee had not made an election to accept compensation.

The Court of Appeals held that both parties were wrong and that there was evidence in the record supporting a finding either way on each issue (R 217, 218).

The Court took the position, however, not theretofore advanced by counsel for any party, that the determination of these issues, although in dispute as to the facts, was for the Court and not the jury and that it should be presumed that the trial judge correctly decided both of those issues on the facts for the plaintiff.

QUESTIONS PRESENTED

The questions presented are whether the Court of Appeals correctly interpreted the Constitution, laws and decisions of the Arizona Supreme Court concerning the application of the Workmen's Compensation Law of that State in reference to the acts constituting an election by an employee of one insured under the Compensation Act to accept such compensation rather than pursue his common law action for negligence against another not in the same employ as himself, what constitutes a person not in the same employ as the injured person, and whether where the evidence in an action by the injured person against one allegedly not in the same employ is in dispute as to those two issues of fact (election of remedy and identical employ), or either of them, the determination thereof is for the Court alone or for the jury.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Petitioners take the position that the Court of Appeals has decided important questions of Arizona law in a way in conflict with the applicable and controlling decisions of that State and contrary to the constitution and laws thereof in this, to-wit:

I.

On the undisputed facts in this case these petitioners, defendants below, were in the same employ as the plaintiff, and, therefore, not subject to liability because of the provisions of Section 56-949, Arizona Code Annotated, 1939.

II.

On the undisputed facts in this case, the plaintiff did make a binding and conclusive election to accept compensation under the Workmen's Compensation Law to the exclusion of any right or remedy to recover from the defendants as persons not in the same employ with the plaintiff, 56-949, 56-950, A.C.A. 1939, and the Court of Appeals was in error in holding that no election resulted unless appellee had (1) knowledge of the alternative remedies available and (2) knowledge that the law precluded him from pursuing but one of such remedies.

III.

That, taking for the argument as correct the decision and opinion of the Court of Appeals holding that there were disputed questions of fact on

(a) The issue of identical employ, and

(b) The issue of election of remedy, the determination of those issues, and each of them, should have been left to the jury;

(c) Petitioners respectfully contend also that the Court of Appeals in holding that said issues of fact were for the decision of the Court and not the jury so far departed from the accepted and usual course of judicial proceedings, and particularly the provision of the Seventh Amendment to the U. S. Constitution and the Rules of Civil Procedure for district courts, particularly 38 and 39 and so far sanctioned such a departure by the United States District Court, as to call for an exercise of this Court's power of supervision.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the 9th Circuit commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of record and all proceedings entitled as in the caption of this petition and catalogued in the lower court as No. 12,594, and that the decision and judgment of the United States Court of Appeals for the 9th Circuit be reversed by this honorable Court and that your petitioners may have such other and further relief in the premises as to this honorable Court may seem just.

GERALD JONES,
of CONNER & JONES,
303-7 Valley National Building,
Tucson, Arizona
Attorney for Petitioners

CERTIFICATE OF COUNSEL

I, the undersigned counsel for petitioners herein, do hereby certify that the foregoing petition for a writ of certiorari in my opinion is well founded and meritorious and is not interposed or filed for the purpose of delay.

GERALD JONES,
of CONNER & JONES,
303-7 Valley National Building,
Tucson, Arizona
Counsel for Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,
Petitioners,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,
Respondents,

and

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,
Intervenors Below.

Brief in Support of Petition For Writ of Certiorari

See Reasons for Allowing Writ in Petition:

ARGUMENT

I.

Identical Employ

The statutes of Arizona define the term: "Independent Contractor." Sect. 56-928. (All statutes are found in the appendix.) This statute has been before the Supreme Court of Arizona in a number and variety of cases and the rule has been laid down that "the test to determine if

one is an employer or an employee is whether the employer retains supervision and control of the work."

Industrial Com. v. Byrne, 62 Ariz. 132, 134, 155 P(2) 784.

Haggard v. Industrial Com.—Ariz.—223 P(2) 915 (Nov. 1950) See Syl. 13.

A new plant was to be installed in Tucson area and integrated with the existing facilities. That the Power Company could carry out this work under the supervision of its own trained personnel, supplemented where needed by engineering assistance, cannot be seriously questioned. They employed Sanderson and Porter under a written contract appearing in the Record (unfortunately not indexed but found at page 35 et seq.). Unless parties may not make themselves employees of another under such circumstances as exist here (and we know of no reason therefor) the defendants became by such contract employees of the Power Company. The right of complete supervision was vested in the Power Company. Without objection the Court received evidence, first from plaintiff's witness Lovell (R 112 to 149) and later from defendants' witnesses Snider (R 127 to 132) Saunders (R 132 to 136), and Broockman (R 136 to 141) which, we submit, shows that the actual control and supervision of the work was consistent with the contract and always in the hands of the Power Company.

II.

(See Reasons for Allowing Writ in Petition)

Election of Remedy

In Arizona an employee of an insured employer is faced with the necessity of making an election of remedies

against his employer. He must choose between compensation benefits on one hand and his rights to sue on the other under the Employer's Liability Act and/or the common law. Prior to 1925 when Article XVIII, Sect. 8 of our Constitution went into effect (See App.), the injured employee could make his election after his injury. The leading case under the old law was *Consolidated Arizona Company v. Ujack,* 15 Ariz. 382, 139 P. 465. Said the Court:

> "The last sentence of section 14, reads: 'Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.' This seems to us a plain declaration by the legislature that the employee is at liberty to pursue any of the remedies provided by law until he adopts one by instituting a suit for redress, when the one adopted becomes exclusive."

This right of an employee to elect his remedy against his employer after injury proved unsatisfactory and it was changed by Art. XVIII, Sect. 8, above-mentioned; and now he must make his election before injury. If he does not wish to be bound by "the Act" he must affirmatively reject it. The courts rigorously enforce the new law. Children, even though illegally employed, one 13 years of age and the other 11, have been held bound by an election resulting from their failure to reject the Act before injury.

S. H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 P(2) 931;

Weaver v. Martori, 69 Ariz. 45, 208 P(2) 652.

Our own case, of course, differs on the facts, for here a suit against a third party is involved. The statute defining an election, is, however, the same in language (56-

950) and it is difficult to understand how an election of remedies as against one's own employer is to be determined by one set of rules and an election against a third party by another. Giving the employee the most favorable consideration, we submit that he may not overcome an election made as provided by 56-949 and 56-950 in the absence of some fraudulent or inequitable conduct that prevented him from freely acting.

Actions involving third party tortfeasors have been before our Supreme Court but twice.

Moseley v. Lily Ice Cream Co., 38 Ariz. 417, 300 P 958;

Industrial Commission v. Nevelle, 58 Ariz. 325, 119 P(2) 934.

In the *Moseley* case, the Plaintiff was in the employ of Maricopa County, an insured under the Compensation Act. While in the course of his employment he was injured by a truck driven by the Lily Ice Cream Company, the alleged third party tortfeasor. Moseley applied for compensation and received and cashed one check of $42.39. He then brought suit against the Ice Cream Company alleging negligence. He lost the case below and appealed to the Supreme Court of Arizona where the judgment was affirmed. He was held bound by an election resulting from his acceptance of said compensation.

The appellant's appeal was based largely on the proposition that Section 56-949 was unconstitutional in that it violated Art. 18, Sect. 6, of the Arizona Constitution which provides that the right of action to recover damages for injuries shall never be abrogated. The court, after what

was apparently a very thorough consideration of the statutes and decisions of other states, upheld the Arizona Statute (56-949). The court said:

> "We are of the opinion both on authority and on a logical interpretation of the language of our statute that, under its provisions, when payment under the Compensation Act is chosen by the injured employee, his rights of every nature against the third person pass as a matter of law to the state or other insurer, and no right of action, either direct or indirect, remains in him as against such third person."
>
> (See Page 423 of the Arizona Reporter and 960 of the Pac. Reporter)

It will be noted from this decision that the appellant therein undertook to raise the point that on the particular facts of his case he had not made a binding election by accepting the one payment of compensation, even if the Statute were constitutional. The Court refused to hear that contention, holding that it had not been pleaded and was not an issue in the case.

In the *Nevelle* case, an employee of a motor company, insured under the Compensation Act, was injured while in the course of his employment because of a collision with an automobile driven by Nevelle. The injured workman applied to the Commission for compensation, which made an award in his favor and also found that the injuries were due to the negligence of Nevelle, the third party. The Commission, claiming an assignment of the cause of action under Section 56-949, sued Nevelle at common law and recovered judgment which was in excess of the amount the Commission had paid the injured workman; and the judg-

ment provided that the excess should be payable to the injured workman. The question in the case was whether this excess was recoverable against the third party tortfeasor either by the Commission or the workman. Here again the Statutes of many states were reviewed and the conclusion reached, first, that the entire cause of action of the injured workman had been assigned to the Commission by his acceptance of compensation benefits and that he had no further interest therein, and, second, that the Commission could not recover for anything in excess of the amount payable by it to the workman under the Compensation Act.

In the course of the opinion, the court said:

> "The question of the amount which might be recovered by the commission was not discussed (in the Moseley case) as that was not an issue in the case, but we did explicitly and expressly hold that any right which the injured employee might have had against the third person no longer belonged to him but was vested in the Commission."

It will be noted that in none of these cases is there a holding by the Arizona Court that the validity of an election either as against an employer or a third party is dependent upon the condition laid down by the Court of Appeals in the following language:

> "The construction placed upon this constitutional limitation by the Arizona courts impels the conclusion that a "reasonable election" of remedy under Arizona law is tantamount to a waiver—"an intentional relinquishment or abandonment of a known right or privilege." (Cf. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).) An injured workman then is accorded a "reasonable election" only when he has (1) knowledge of

the alternative remedies available and (2) knowledge that the law precludes him from pursuing but one of such available remedies. (Cf. *Consolidated Ariz. Smelting Co. v. Ujack,* 15 Ariz. 382, 139 Pac. 465, 467 (1914).) Absent such knowledge, to seek one remedy does not constitute an election to waive another. (See *Johnsen v. American Hawaiian SS. Co.,* 98 F.2d 847 (9th Cir. 1938).)"

In support of the court's conclusion, it refers to *Consolidated Arizona Smelting Company v. Ujack,* supra.

With all due respect to the Court of Appeals, we submit that this is an entirely erroneous view of that case. It is concededly a case of high importance on the question, perhaps the leading case in Arizona, but in our practice it stands for the reverse of the view the Court of Appeals has taken of it. See 6 A.L.R. (2), page 14, note 10.

The application of the *Ujack* case insofar as suits by a workman against his employer are concerned has been considerably limited by the requirement that the employee elect before his injury rather than be allowed to elect thereafter, as was the case when the *Ujack* case was decided, but there are instances still in which an employee has after his injury a right of election to sue his employer, even though he did not reject the Act. These instances are where the employer has failed to post notices of the terms of the Compensation Act in the manner prescribed by Statute or where the employee's injury is due to the employer's wilful misconduct. See Sections 56-944, 56-945 and 59-946 in the index.

We submit that under Section 56-950 as construed in the light of the *Ujack* case, if an employee in either of those situations brings an action against his employer either at

common law or under the Employer's Liability Act, or both, he may not thereafter claim compensation and, vice versa, if he claims compensation, he may not thereafter bring such an action against his employer under either of said acts.

The other case cited by the Court is:

Johnsen v. American Hawaiian SS, 98 Fed.(2), 847 (9th Circuit, 1938).

We believe the Court of Appeals was very largely influenced by this decision. It involved the question whether an employee insured under the Federal Longshoremen Act had by his acceptance of compensation thereunder assigned to his employer any right to recover damages for negligence against a third person and thereby precluded himself from suing such third person. This Statute, being:

44 Stat. 1440, C. 509, 33 U.S.C.A., Sect. 933;
10 F.C.A. Title 33, Sect. 933,

read before amendment as follows:

> "Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election."

The Court of Appeals in the *Johnsen* case did hold that the Statute should have no application if an employee in accepting compensation did not realize he was put to a choice of alternative remedies and that by choosing one he excluded the other.

That interpretation of the Statute found no favor in other courts. In the second and third Circuits the courts held that mere acceptance of compensation precluded the employee from suing the third party tortfeasor.

For brevity and a list of the cases, with statutes quoted, we call the court's attention to Note 18 to its opinion in

American Stevedores v. Porello, 330 U.S. 446, 67 S.Ct. 847, 91 L.Ed. 1011.

(It could not be said that this court in the *Porello* case approved the stand taken by the courts of appeals in the second and third circuits and disapproved the holding of the court for the 9th circuit, but we do note this language of the opinion:

> "The petitioner admits that 33(b) of the Longshoreman's Act was amended in 1938 so that mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third party tortfeasor, a conclusion which courts had reached under the former wording of the Act.")

Note 18, after quoting the Statute (like our 56-949), reads:

> "Under this form of statute, courts had held that acceptance of compensation precluded the employee from suing a third party tortfeasor," (citing cases as noted above.)

In one of those cited, *Toomey v. Waterman S. S. Corp.,* 123 F.(2) 718 (C.C.A. 2) (Augustus N. Hand, speaking for L. Hand and Charles E. Clark) the court expressly declared that the employee's "conscious exercise of election"

was, in the face of the statute, immaterial, and said of the *Johnsen* case:

> "In Johnsen v. American-Hawaiian S.S. Co., 98 F.(2) 847 the Court of Appeals for the ninth circuit overlooked the definite language of Section 933(b) whereby acceptance of 'compensation shall operate as an assignment to the employer of all right * * * to receive damages against such third person * * *'."

And respectfully we suggest the same court "overlooked" the equally positive language of our sections 56-949 and 56-950.

We do not here have a case where the employee was in ignorance of his claim against the third party for negligence —no element of mistake as to the facts. Nor do we have a case involving fraudulent or inequitable conduct on the part of the defendants or any one else by which the appellee was induced to accept compensation and other benefits under the Act. There have been Arizona cases where the element of fraud entered. In each of these the employee had rejected the Act but later sought its benefits and the court laid down the rule that whether his rejection (which amounted to an election not to take compensation) was valid or not was to be tested by the principle of equity permitting avoidance of contracts for fraud.

> *Bradley v. Ind. Com.*, 51 Ariz. 291, 76 P.(2) 745;
> *Red Rover Copper Co. v. Ind. Com.*, 58 Ariz. 203, 118 P.(2) 1102, 137 A.L.R. 740.

Our Arizona Supreme Court has, we submit, taken the same view of our section 56-949 that the Court of Appeals in the second and third circuit have taken of the like provision of the Longshoreman's Act, and, we believe, the Court

of Appeals was in error in applying the rule of the *Johnsen* case.

PLAINTIFF'S OWN CASE ON THE FACTS AS TO ELECTION

The plaintiff was injured on June 17, 1949. On July 6, 1949, he forwarded application forms for compensation to the Commission (R 164). He made several supplemental claims for compensation, one on July the 14th, 1949, another August 15th, 1949, and another August 30, 1949, and the last one September 14, 1949 (R 177-185), but later withdrew the last one (R 108). The Industrial Commission on July 9, 1949, acted upon the first application and entered its findings and order allowing compensation (R 186). For the period beginning June 18, 1949, to and including August 30, 1949, he received $621.85 as compensation (R 175) and medical benefits in the sum of $1,037.34. There is no dispute about these payments and by stipulation the Industrial Commission was given a lien therefor, totaling $1659.19, on the plaintiff's judgment (R 81). On October the 25th the plaintiff filed with the Commission a document designed for the election of remedy against the third party (R 168)—(it bears date November 12, 1949, but was actually filed as indicated.) It purports to elect to sue Sanderson and Porter under the provisions of Section 56-949. This election was not honored by the Commission and the plaintiff took no further steps before that body or by certiorari to the Supreme Court of Arizona (R 124).

The plaintiff alleged in his complaint that the application forms for compensation were sent to him by the Commission without request from him and that while he was still hospitalized and without means to support his wife and family and without advice of counsel, he filled the forms

out and sent them to the Commission; that he made no election of remedy since he had no knowledge of the necessity of so electing, or that acceptance of compensation might constitute an election or waiver; that after he had accepted "3 or 4" compensation checks, and sometime after August 15, 1949, he consulted counsel and was advised that he might have made an "apparent election, election or waiver"; and that on October 24 he filed an election of remedy choosing the right to sue the third party; that his name was removed from the compensation rolls and that he had not accepted compensation after August 15, 1949 (R 11).

At the trial he testified that he had made the claims for compensation and that after he employed attorneys they told him at first they did not know whether he had the right to sue or not; also that he thought at all times that he had the right to sue Sanderson and Porter and also to accept compensation and that he didn't suspect that he couldn't do both until he consulted his lawyer (R 107-109).

It is clear, therefore, that appellee's right to change the election resulting from accepting compensation must be founded on his contention that he thought he had the right to take compensation and also to sue Sanderson and Porter and that by filing claims and taking compensation benefits he did not foreclose his right to sue Sanderson and Porter.

Taken as true, such view of the law under the Arizona decisions was wrong and should not have been accepted as correct by the Circuit Court of Appeals.

APPELLEE'S REMEDY THROUGH ARIZONA SUPREME COURT

We also think that the appellee was bound to accept compensation in the absence of any effort on his part to secure a reversal of the Commission's refusal to permit him to

enforce the election he filed in October 1949 (R 168). The award of the Commission was a clear assumption of jurisdiction (R 186) and in our view any effort to avoid it should have been presented in accordance with the provisions of the Arizona Statute, 56-972, which allows a writ of certiorari to the Supreme Court after a party to compensation proceedings has exhausted his remedy before the Commission.

The sole authority to reverse the orders and actions of the Commission is in the Supreme Court of the State.

S. H. Kress Company v. Superior Court, 66 Ariz. 67, 182 Pac.(2) 931.

Nothing but confusion can result if employees dissatisfied with the action of the Commission in the matter of election of remedies may appeal to the superior courts. When the plaintiff first brought this case, he apparently took the position that the election or the apparent election he had made should be set aside by a Court before he could recover (see prayer to complaint, R-12; also later amendment of prayer, R-66). We believe he was right and that his effort in that regard should have been before the Supreme Court of the State.

That tribunal is the ultimate and final authority on the scope and effect of our Compensation Act. Its decisions are binding on the Federal courts. In the interest of harmony, effective and prompt enforcement of the Act, the legislature, we believe, intended that the employee should resort to the Supreme Court of Arizona if at any time he invokes the jurisdiction of the Commission. Perhaps the plaintiff in this case could have ignored the Commission

in the beginning and filed his suit against the third party, but having taken compensation under an award from the Commission, the remedy open to him when he decided to sue Sanderson and Porter was first to have his earlier election set aside by the Commission or on certiorari by the Arizona Supreme Court.

At this point, we desire to call to the Court's attention, and we trust the Court will consider this as a certificate, that there is now pending in the Supreme Court of Arizona on certiorari from the Commission an action in which one Frank E. Pressley is plaintiff and the Industrial Commission of Arizona is respondent, No. 5431, wherein the meaning and scope of sections 56-949, 56-950, as applied to actions against third parties, such as this one, are involved. Amicus curiae in that case also attack the constitutionality of 56-949 and endeavor to have the court overrule the *Moseley* and *Nevelle* cases, supra. The briefs of the respective parties have been filed and the case was argued and submitted on April 16th. We called this Arizona case to the attention of the Court of Appeals.

In that case, Pressley was the injured employee and entitled to compensation insurance from his employer. He filed a claim with the Industrial Commission but actually accepted no compensation therefrom, having meanwhile consulted an attorney and concluded to sue a third party for negligently causing his injury. He had received certain "accident benefits," said to be of a different category from medical benefits, and the point was made they are not within the purview of 56-950. He, however, applied to the Industrial Commission for an award permitting him to make an election, notwithstanding his earlier application for com-

pensation and acceptance of accident benefits, to sue the third party. This was denied by the Commission and the employee took by certiorari his case to the Arizona Supreme Court—a procedure we contend appellee here should have followed.

We believe that the decision of the Arizona Supreme Court in the *Pressley* case is bound to pass upon questions of law pertinent to the inquiry before this Court, and that it may perhaps be controlling on this Court under the doctrine of *Erie Railroad Company v. Tomkins,* 304 U.S. 64.

It is, therefore, respectfully contended that the interpretation put upon the Arizona Statutes and decisions by the Circuit Court of Appeals is erroneous and that, accepting as true plaintiff's own testimony, the appellee did by filing claims with the Commission and accepting compensation and medical benefits therefrom make a binding election under Sections 56-949 and 56-950 whereby any cause of action he had against these petitioners was assigned to the Commission and appellee could not thereafter recover thereon against petitioners.

III (a) and (b)

(See Reasons for Allowing Writ in Petition)

Right to a Jury Trial on Issues of Identical Employ and Election of Remedy

(a) *Identical Employ.* The Court of Appeals declares there was evidence pro and con on this issue but that the determination thereof was for the judge alone. Under the Constitution, Article 18, Section 8, and Section 56-949, if the plaintiff was in the same employ as these defendants he cannot recover. This issue is independent of the issue of election of remedies. If the "employ" of plaintiff and

defendants was identical, it is entirely immaterial whether the plaintiff made an election or not.

The Court of Appeals groups the two issues as follows:

> "It is axiomatic that 'every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.' (Texas & Pac. Ry v. Gulf Ry., 270 U.S. 266, 274 (1926); see Rhode Island v. Mass., 12 Pet. (37 U.S.) 657, 718-720 (1938).) Here the district court had jurisdiction of the subject matter only if plaintiff and Sanderson & Porter were 'not in the same employ' and if plaintiff had not made an election under the statute to take compensation. (S. H. Kress & Co. v. Superior Court, supra, 66 Ariz. 67, 182 P.2d 931). Being jurisdictional, these issues were triable to the court, not the jury. And the district court properly withheld them from consideration by the jury. (See Weaver v. Martori, 69 Ariz. 45, 208 P.2d 652 (1949); State v. Phelps, 67 Ariz. 215, 193 P.2d 921, 924 (1948); Dolese Bros. v. Tollett, 162 Okla. 158, 19 P.2d 570 (1933)."

THE JURISDICTIONAL QUESTION

The Arizona Supreme Court defined jurisdiction over subject matter of a cause of action in *State v. Phelps,* supra, (see the quotation just above), as follows:

> "In Tube City Min. & Mill Co. v. Otterson, 16 Ariz. 305, 146 P. 203, 206, L.R.A. 1916E, 303, this court said: 'The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong. (Citing cases.)'
>
> "In this Tube City case our court quoted with approval from Manley v. Park, 62 Kan. 553, 64 P. 28, as follows: 'Jurisdiction over the subject-matter' is the right of the court to exercise judicial power over

> that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or, under the particular facts, is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. * * * By 'jurisdiction over the subject-matter' is meant the nature of the cause of action and, of the relief sought, and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. * * * The power to determine and decide a case includes the power to decide it wrong as well as to decide it right. See also Bates v. Mitchell, 67 Ariz. 151, 192 P.2d 720." (67 Ariz. 215, 220, 193 P(2) 921 at 925.)

Justice Miller, in *Cooper v. Reynolds,* 10 Wall. 308, 19 L.Ed. 931, for this Court said:

> "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of the powers, or in authority specially conferred."

In *Behringer v. Inspiration C. C. Co.,* 17 Ariz. 232, 149 P. 1065, the plaintiff, as administrator of a deceased employee of the defendant, filed an action under the Arizona Lord Campbell's Act for injuries resulting in death and was met with a demurrer. The Supreme Court pointed out that the contention that the employee was bound by the Compensation Act was a matter of defense, saying:

"But, in the absence of such an allegation, should the court assume, as a matter of law, that there was no repudiation of the provisions of the Compensation Act, or that the employee had elected to pursue that remedy, or, rather, are not these matter of fact to be raised by plea or answer? It is evident that the defendant might be in a position to insist upon a settlement of the damages claimed under the Compensation Act, and yet waive that right. For instance, after an election by the employee to accept compensation in such a manner as to be bound, the employer might choose to take chances in a contest for damages for negligence if sued therefor, by the employee, and be within his rights. We therefore are of the opinion that, if there was an election to accept compensation, that fact is defensive matter, and, if not raised by plea or answer, may be waived by defendant. It follows that the general demurrer should have been overruled."

It is submitted that the subject matter of this action is a suit at common law for personal injuries due to negligence. In one form or another it has existed for centuries in England and in this country. There was no occasion for the plaintiff in this case to allege his employment with the Power Company, or that the appellants were independent contractors, or that he had accepted compensation in ignorance of his rights. In defendants' (petitioners') resistance to a simple action for negligence they could have omitted any reference to the Compensation Act at all.

The issue as to identical employ does not, we respectfully submit, go to the jurisdiction of the Court over the subject matter of this suit. It is an erroneous interpretation of our statutes and decisions to conclude that the Court had jurisdiction only if Sanderson and Porter were

not in the same employ as the plaintiff. Applying (for the argument) the Statute in the same manner as the Court of Appeals has applied it, jurisdiction over the subject matter would depend, not alone upon the finding that the parties were not in the same employ. There would have to be the additional finding that the defendants were not negligent. There are two necessary conditions to "jurisdiction"—negligence and absence of identical employ. The first sentence of the Statute reads:

> "If an employee entitled to compensation hereunder is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, etc." (56-949)

The Court, upon filing the action, necessarily, it seems to us, had jurisdiction of the subject matter, of which a part was the determination not alone of the question of identical employ but of the question of negligence. The finding by the Court either that the defendants were not negligent, or that they were not in the same employ with the plaintiff, would defeat the action, but not the court's jurisdiction.

The holding that the court had the right to take unto itself the determination of the question of identical employ on the ground that it was a jurisdictional question (a conclusion resting on implication purely) is not only contrary to our decisions, but, we submit, is contrary to customary and usual practice prevailing in courts. If the court below had the right to determine that issue, independent of the jury, it had the right also, indeed it must if the reasoning of the Circuit Court of Appeals is correct, to decide the

issue of negligence, thus leaving nothing for the jury beyond the assessment of damages.

There seems to be a suggestion in the opinion that the petitioners maintained to the District Court that the issue of identical employ was for the court and not the jury. We are at loss to understand this suggestion. It is true that in the motion to dismiss (R 25) one ground was lack of jurisdiction over the subject matter, but that was based upon the allegations of the complaint concerning the election of remedies and the demand of the plaintiff (R 12) that the court set aside and render void any apparent election or waiver that the plaintiff may have made. That the trial court did not have jurisdiction to set aside an election would seem obvious, particularly in the light of Section 56-971, A.C.A. 1939 (see appendix). Apparently the plaintiffs thought the same way because at the very opening of the trial they moved to amend the complaint by striking out said demand (R 100). It was granted (R 66, 69).

When the defendants made their motion for instructed verdict at the close of the plaintiffs' case (R 124, etc.) and at the close of the entire case (R 142, etc.) and their motion for judgment non obstante (R. 84, etc.) they did not remotely suggest that there was any jurisdictional question involved in determining this issue of identical employ.

S. H. Kress, supra, cited by the Court as authority that this issue of identical employ is jurisdictional, involved an application for a writ of prohibition against the Superior Court to prevent it from entertaining jurisdiction in a case where an employee sued his own employer. The issue was whether or not the employee made an election of remedies against his employer by failing to reject the Act. The Court

held that the pleadings revealed such an election had been made and that it was a jurisdictional defect to the consideration of the case. (It will be noted, however, from reading the opinion that the main question in the case was whether an illegally employed infant of thirteen years could make a binding election of remedies, and it was to settle that question that the court entertained prohibition. The court was no less than apologetic even in that situation in sustaining the jurisdictional objection.)

That case involved election of remedies but did not involve the issue we are discussing—identical employ. The Court of Appeals grouped the two together, but there is essential difference between them.

Weaver v. Martori, also cited by the Court of Appeals, was a case involving a claim of an employee against his employer and the question of election of remedies by an infant of eleven years.

The *Phelps* case was a mandamus action by the State of Arizona against a Superior Court Judge that he proceed to try a criminal action. The judge thought it was beyond his jurisdiction. The court above took the other view and said, among other things, that the first duty of the court is to determine whether it has jurisdiction.

The *Dolese* case, supra, from Oklahoma, was an action, like this one, against a third party under a statute similar to ours, 56-949, and, discussing the issue of identical employ, the court did say that the trial court was required to determine whether it had jurisdiction of the subject matter of the action and that that was not a matter for the jury. We submit, however, that when the entire opinion is read the pertinent language of the decision on the jurisdictional question is suspectible of the interpretation that the evi-

dence was undisputed and for that reason the issue was properly not submitted to the jury.

In any event, this Oklahoma case has no binding force in Arizona. There are, no doubt, many points of similarity in the laws of the two states, and there are many points of difference, and the trial procedure is certainly not the same. Any conclusion by the Federal courts of the applicable law in Arizona should under the rule of *Erie Railroad Company v. Tomkins,* 304 U.S. 64, be based upon Arizona decisions.

(b) *Election of remedy.* The disputed issue of fact here was, as determined by the Circuit Court of Appeals, whether the plaintiff at the time he accepted compensation and other benefits from the Commission had knowledge of his alternative remedies and knew that by choosing compensation benefits he was precluding himself from any claim at law. As shown by *Behringer* case, supra, the plea that the plaintiff had elected another remedy is defensive matter and if not raised in the answer is waived. The *Kress* case, supra, as we have already pointed out, considered this issue as jurisdictional where employer and employee were involved, but the writ of prohibition sought in that case was used merely as a vehicle to decide questions affecting the compensation law. See last paragraph of the opinion, 66 Ariz. 67 at 75; 182 P.(2) 931 at 936.

III (a) and (b)

Right to Jury on Both Matters

No point was made by the appellees below that genuine questions of fact as to these issues could be taken from the jury. On the contrary, appellee's counsel cited to the Court

of Appeals as correctly stating the law on the issue of identical employ the following:

> "As in civil actions generally, where the evidence on a material issue in actions involving the relation of master and servant is conflicting or admits of more than one inference, the question thereby raised is one of fact for the determination of the jury; otherwise the question is one of law for the court. 56 C.J.S.P. 92."

Indeed, one of their requested instructions to the jury (No. 6, R 73) undertook to advise the jury on that score.

The right to a trial by jury is jealously guarded in Arizona. In all actions whether sounding at law, or in equity, the parties are entitled to have disputed issues of fact submitted to the jury. The verdict of the jury has the same binding effect in common law actions as it had at common law; and while the court may disregard the verdict of the jury in an action sounding in equity, it must nevertheless at the demand of a party submit the issues of fact to the jury, and "harken" to its conclusion.

Mounce v. Wightman, 30 Ariz. 45, 243 P. 916;
Stukey v. Stephens, 37 Ariz. 514, 295 P. 973.

III (c)

See Reasons for Allowing Writ in Petition

By the 7th amendment to the Federal Constitution, the right of trial by jury is directed to be preserved in suits at common law if the value exceeds $20.00. That this action sounds at common law, as it was understood and applied when the Constitution was adopted, there cannot be any serious question, we submit. The rights guaranteed under this amendment as well as under the Arizona Constitution

and laws are not to be whittled down to a point of disappearance by labeling them "jurisdictional," and, consequently out of the province of the jury. That is precisely what was done here; and not only that: but on the basis of a judicial presumption that the trial judge assumed the right to decide the fact issue himself, whereas every implication from the record is that he thought there was no issue of fact at all.

Presumably the question as to what is the subject matter of this action turns on the Arizona Statutes and decisions, but it would seem that the procedure for the trial of the facts involved is federal.

The seventh amendment still has some life left,

> *Dimick v. Schiedt,* 293 U.S. 474; 55 S.Ct. 296, 70 L. Ed. 603, 95 A.L.R. 1150,

and district court procedure rule 12(b)(1), giving district courts the power to dismiss on motion for lack of jurisdiction over the subject matter, was written in the light of the amendment. Rule 38(a) preserves the right to a jury trial as granted by the seventh amendment and Rule 39 requires the trial of all issues to be by jury, where demanded (see App.).

Rule 12(b)(1) carried forward in very much abbreviated fashion Section 37 of the Judicial Code, later appearing U.S.C.A., Title 28, Section 80. See 28 U.S.C. 1359 and 1447, dealing with collusive joinders and improvident removal.

There is no longer any doubt that the court need not send to the jury the issues of fact concerning the constitutional or statutory limitations upon the jurisdiction of federal courts, i.e., such questions as diversity of citizenship, and

amount in controversy, *McNutt v. General Motors,* A.C. 298 U.S. 178; 80 L.Ed. 1135; 50 S.Ct. 780, but there are cases where "jurisdiction" of the court depends upon the determination of an issue of fact inherent in the cause of action itself in which the courts universally hold, with apparent approval of this court, that the issue is for the determination of the jury. We refer to actions under the Federal Employers' Liability Act and allied statutes where the question is whether the plaintiff was engaged in interstate commerce, an issue to be raised by the pleadings and essential to the court's "jurisdiction." No case has been found holding that that issue of fact may be determined by the court alone. The cases, state and federal, are all the other way, and petitions for certiorari to this court have been uniformly denied. See 57 C.J.S., page 151.

While the plaintiff in this case originally undertook to have the court set aside the action of the Industrial Commission (R 12), a matter beyond the jurisdiction of the court, he amended before the trial began by striking out that part of his prayer (R 100), his motion in that regard being granted by the court (R 66), thus leaving his action one at common law against these defendants. It is submitted they had the right to have the issues of fact as to identical employ and election of remedy submitted to the jury.

CONCLUSION

Accordingly it is respectfully submitted:

1. That the petition for a Writ of Certiorari should be granted.

2. That the judgment of the Court of Appeals and of the District Court should be reversed and judgment ordered for petitioners because on the undisputed evidence plaintiff and petitioners were in the same employ, and the plaintiff made a binding election to accept compensation benefits.

3. The said judgment should be reversed and a new trial granted because the issues of identical employ and/or election of remedies should have been submitted to the jury. (The court's attention is again directed to the case now pending in the Arizona Supreme Court, which is mentioned above.)

Respectfully submitted,

GERALD JONES,
of CONNER & JONES,
303-7 Valley National Building,
Tucson, Arizona,
Counsel for Petitioners.

(Appendix follows)

APPENDIX

The Seventh Amendment to the Constitution of the United States reads as follows:

> "(Trial by jury in civil cases.)—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Rules 12(b), 38 and 39(a) of the Rules of Civil Procedure for district courts read as follows:

> "12(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted." • • • (The remainder does not appear to be pertinent.)
>
> "38. Jury trial of right.—(a) Right preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing

at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

"(c) Same; specification of issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

"(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

"39. Trial by jury or by the court.—(a) By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Article 2, Section 23 of the Arizona Constitution reads as follows:

"23. (Trial by jury.)—The right of trial by jury shall remain inviolate, but provision may be made by law for a jury of a number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of a jury in civil cases where the consent of the parties interested is given thereto."

Article XVIII, Section 8, Arizona Constitution, reads:

"Section 8. (Workmen's compensation.)—The legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the state, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of, and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees, to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer as provided by this constitution; and, provided further, in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen,

their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the state of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such Workmen's Compensation Law prior to the injury.

"The percentages and amounts of compensation provided in House Bill No. 227 enacted by the seventh legislature of the state of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227 eliminated except by initiated or referred measure as provided by this constitution."

The following references are to Arizona Code Annotated, 1939:

Section 56-904, so far as pertinent, reads:

"The commission may adopt rules of procedure, rules for the fixing of rates, for the presenting of claims, and such other rules and regulations as are necessary for its business, and change the same from time to time. It may, in its name, sue and be sued in all actions or proceedings arising out of or relating to the state compensation fund."

Section 56-907, so far as pertinent, reads:

"The commission shall have full power, jurisdiction and authority to administer and enforce all laws for the protection of life, health, safety and welfare of employees in every case and under every law, where such duty is not now specifically delegated to any other board or officer, * * *".

Section 56-928 reads:

"56-928. Employers subject to law.—(a) Employers subject to the provisions of this article are: 1. the state, 2. each county, city, town, municipal corporation, and school district, and, 3. every person who has in his employ three (3) or more workmen or operatives regularly employed in the same business or establishment, under contract of hire, except agricultural workers not employed in the use of machinery, and domestic servants; but exempted employers of agricultural workers or domestic servants, or employers of less than three (3) workmen or operatives, may come under the provisions of this article by complying with its provisions and the rules and regulations of the commission. For the purposes of this section 'regularly employed' includes all employments, whether continuous throughout the year, or for only a portion of the year, in the usual trade, business, profession, or occupation of an employer.

"(b) When an employer procures work to be done for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, then such contractors and the persons employed by him, and his subcontractor, and persons employed by the subcontractor, are within the meaning of this section, employees of the original employer.

"(c) A person engaged in work for another, and who while so engaged is independent of the employer in the execution of the work, not subject to the rule or control of the person for whom the work is done, but is engaged only in the performance of a definite job, or piece of work, and subordinate to the employer only in effecting a result in accordance with the employer's design, is an independent contractor, and an employer

within the meaning of this section. (Laws 1925, ch. 83, sec. 44, p. 345; rev., R.C. 1928, sec. 1418; Laws 1945, ch. 33, sec. 1, p. 65.)"

Section 56-930, so far as pertinent, reads:

"'Order' shall mean and include any rule, regulation, direction, requirement, standard, determination or decision of the commission; • • •

"'Compensation' shall mean the compensation and benefits provided herein;

"'Award' shall mean the finding or decision of the commission of the amount of compensation or benefit due an injured or the dependents of a deceased employee."

Section 56-944 reads:

"56-944. Option of employees engaged in hazardous occupations—Notice by employer and employee—Effect of failure to give.—Employers who comply with the provisions of section 1422 (56-932) shall not be liable to respond in damages at common law or by statute, except as hereinafter provided, for injury or death of an employee wherever occurring, provided however, that it shall be optional with employees to accept compensation as provided herein or to reject the provisions hereof and retain the right to sue said employer as provided by law. Such election to reject the terms of this article shall be made by a notice in writing, signed and dated, given by an employee to his employer, in duplicate, in substantially the following form: 'To (name of employer): You are hereby notified that the undersigned elects to reject the terms, conditions and provisions of the law for the payment of compensation, as provided by the compulsory compensation law of the state of Arizona, and acts amend-

atory thereto.' Such notice must be filed with the employer prior to injuries sustained by such employee, and thereafter, and within five (5) days, the employer must file with the commission the duplicate of such notice so served by such employee. All employees shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions hereof, unless said notice in writing has been served by the said employee upon his employer prior to injury.

"Every employer of employees engaged in occupations as designated herein shall post and keep posted in a conspicuous place upon his premises, in all languages spoken by his employees and available for inspection by all workmen, a notice in substantially the following form: 'All employees are hereby notified that in the event they do not specifically reject the provisions of the compulsory compensation law they are deemed by the laws of Arizona to have accepted the provisions of such law, and to have elected to accept compensation under the terms of said law, and that under the terms thereof employees have the right to reject the same by written notice thereof prior to any injury sustained, and that blanks and forms for such notice are available to all employees at the office of this company.'

"If an employer fails to post and keep posted said notice as required or fails to keep available at the place where laborers are hired, the blank forms of notice herein provided for to be signed by workmen, no employee who shall thereafter engage in employment for such employer, during the time that such notices shall not be posted or during the time that such blanks are not available, shall be deemed to have accepted the provisions of this article and it shall be optional for such employee, if injured during said pe-

riod when blanks were not available or such notice was not posted, to accept compensation hereunder or maintain other action against the employer. (Laws 1925, ch. 83, 60, p. 345; rev., R.C. 1928, 1430.)"

Section 56-945 reads:

"56-945. Notice of authorization to be posted by employers electing to pay direct compensation.—Each employer providing insurance or electing directly to pay compensation, as herein provided, shall post in conspicuous places about his place of business typewritten or printed notices stating that he has complied with the provisions of this article and of all of the rules and regulations of the commission made in pursuance thereof and has been authorized by the commission directly to compensate such employees or dependents, and the same, when so posted, shall constitute sufficient notice to his employees of the fact that he has complied with the law as to securing compensation to his employees and their dependents. (Laws 1925, ch. 83, 61, p. 345; rev., R.C. 1928, 1431.)"

Section 56-946, reads:

"56-946. Compensation exclusive remedy—Exceptions.—The right to recover compensation pursuant to the provisions of this article for injuries sustained by an employee shall be the exclusive remedy against the employer, except as provided in the two preceding sections, and except where the injury is caused by the employer's wilful misconduct and such act causing such injury is the personal act of the employer himself, or if the employer be a partnership, on the part of one of the partners, or if a corporation, on the part of an elective officer thereof, and such act indicates a wilful disregard of the life, limb, or bodily safety of employees, such injured employee may, at his option,

either claim compensation or maintain an action at law for damages. The term 'wilful misconduct' as employed in this section shall be construed to mean an act done knowingly and purposely with the direct object of injuring another. (Laws 1925, ch. 83, sec. 65, p. 345; rev., R.C. 1928, sec. 1432.)"

Section 56-949, reads:

"56-949. Liability of third person to injured employee.—If an employee entitled to compensation hereunder is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall elect whether to take compensation under this title or to pursue his remedy against such other. If he elect to take compensation, the cause of action against such other shall be assigned to the state for the benefit of the compensation fund, or to the person liable for the payment thereof, and if he elect to proceed against such other, the compensation fund or person, shall contribute only the deficiency between the amount actually collected and the compensation provided or estimated herein for such case. Compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for herein shall be made only with the written approval of the commission, or of the person liable to pay the same. (Laws 1925, ch. 83, Sec. 66, p. 345; rev., R.C. 1928, sec. 1435.)"

Section 56-950, reads:

"56-950. Election of remedy—Waiver.—Every employee, or his legal representative in case death results, who makes application for an award, or with the consent of the commission accepts compensation from an employer, waives any right to exercise any

option to institute procedings in any court. Every employee or his legal representative in case death results, who exercises any option to institute proceedings in court waives any right to any award or direct payment of compensation from his employer. (Laws 1925, ch. 83, sec. 67, p. 345; R.C. 1928, sec. 1436.)"

Section 56-967 reads:

"56-967. Application for compensation or for increase—Time limit.—An employee entitled to compensation shall file with the commission his application therefor together with the certificate of the physician who attended him. The physician shall inform the injured employee of his rights under this article and shall lend all necessary assistance in making the application for compensation and such proof as required by the rules of the commission, without charge. Where death results from the injury, the parties entitled to compensation, or some one in their behalf, shall make application for the same to the commission, accompanied with proof of death and proof of relationship showing the parties to be entitled to compensation, certificate of attending physician, if any, and such other proof as required by the rules of the commission. Like application shall be made for an increase or rearrangement of compensation. No increase or rearrangement shall be operative for any period prior to application therefor, and any such increase or rearrangement shall be within the limits and classifications provided herein. No application shall be valid or claim thereunder enforceable unless filed within one (1) year after the day upon which the injury occurred or the right thereto accrued. (Laws 1925, ch. 83, 80, p. 345; rev., R. C. 1928, 1447.)"

Section 56-971 reads:

"56-971. No injunction to issue—Exception.—No injunction shall issue suspending or restraining any order, award, classification, or rate adopted by the commission, or any action of any officer required by the provisions hereof, except as herein provided; but nothing herein shall affect any defense to an action brought by the commission or the state in pursuance of the authority contained herein. (Laws 1925, ch. 83, sec. 88, p. 345; rev., R. C. 1928, sec. 1451.)"

Section 56-972 reads:

"56-972. Appeal to Supreme Court.—Within thirty (30) days after the application for a rehearing is denied, or if the application is granted within thirty (30) days after the rendition of the decision on the rehearing, any party affected thereby may apply to the Supreme Court of the state for a writ of certiorari to review the lawfulness of the award. Such writ shall be made returnable within thirty (30) days, and shall direct the commission to certify its record, proceedings and the evidence to the court. On the return day the cause shall be heard in the court unless for good cause continued, and shall be heard on the record of the commission as certified by it. The review shall be limited to determining whether or not the commission acted without or in excess of its power; and, if findings of fact were made, whether or not such findings of fact support the award under review. If necessary the court may review the evidence.

"The commission and each party to the proceeding before the commission may appear in the review. The court shall enter judgment either affirming or setting aside the award. The rules of civil procedure relating to certiorari shall, so far as applicable, and not in conflict herewith apply. (Laws 1925, ch. 83, sec. 90, p. 345; rev., R. C. 1928, sec. 1452.)"

SUBJECT INDEX

	Page
Preliminary Statement	1
Reasons Relied on for Denial of the Writ	1
A. The Question of Identical Employ	2
B. The Election Question	3
C. The Court as Trier of the Jurisdictional Facts	4
Argument	4
I. Identical Employ	4
"Respondents' Constitutional Argument"	5
II. Election of Remedy	6
Restatement of Facts as to Election	6
Estoppel	7
The Arizona Law	8
III. The Jurisdictional Question	9
Petitioner Estopped by Invited Error	9
Argument on the Merits	9
IV. Ownership of the Cause of Action	10
V. Petitioner's Right to a Jury	11
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases	Pages
Alabama Freight Co. v. Hunt, 29 Ariz. 419, 242 Pac. 658	6, 8
DeBord v. Proctor & Gamble Distributing Co., 58 F. Supp. 157, affd. 146 F.2d 54	11
Dolese Bros. v. Tollett, 162 Okla. 158, 19 P.2d 570	10
Freire v. Matson Nav. Co., 109 P.2d 1022	10
Johnson v. American-Hawaiian S.S. Co., 98 Fed. 2nd 847	8
Moseley v. Lily Ice Cream Co., 38 Arizona 417, 300 Pac. 958	3
Parkhill Truck Co. v. Wilson, 190 Okla. 473, 125 P.2d 203	7
Southern R. Co. v. Gadd, 233 U.S. 572, 58 L.Ed. 1099, 34 S.Ct. 696	12

Statutes	
Arizona Code Annotated, 1939:	
Section 56-928	2
Section 56-949	3, 5, 8, 10
Arizona Constitution, Article 18, Section 6	5, 8

Texts	
5 C.J.S., Appeal and Error, Section 1503	9
56 C.J.S., "Master & Servant," pp. 48, 92	11
57 C.J.S. "Master & Servant" 348	5

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 763

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,

Petitioners,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Respondents,

and

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,

Intervenors Below.

Brief in Opposition to Petition for Writ of Certiorari

PRELIMINARY STATEMENT

Reasons Relied on for Denial of the Writ.

In all candor, the respondent fails to detect, among the reasons marshalled by the petitioner to invoke the writ, any "special or important reasons" (Rule 38, par. 5) which would command a review by this court of the above cause.

In fact, counsel are compelled to assert that the petition on file herein is frivolous and without any substantial basis whatever.

The petition, it is submitted, clearly falls outside the purview of Rule 38, par. 5(b), for these reasons:

A. The Question of Identical Employ.

This issue involved an interpretation, in light of the particular facts adduced in this case, of that statute (Section 56-928, ACA 1939) in Arizona's workmen's compensation act which defines an "independent contractor." (*Note:* All statutes discussed in this brief are fully set forth in the appendix to petitioner's brief.) Trial and appellate judges of the highest caliber have carefully analyzed the mass of evidence on this question and unanimously concluded that the plaintiff and defendant were not "in the same employ." We seriously doubt that the decision of the Court of Appeals on this point concerns "an important question of local law" within the meaning of the rule. Indeed, counsel would suggest that there is perhaps no better example of a question, on a certiorari petition, which should *not* be accorded the dignity of "an important question of local law" than a dispute over the application of facts to a statute which defines, in broad language, an "independent contractor"—a field of the law where opinions differ widely and necessity requires ample room for play of the joints. It is presumptuous for counsel to assume that this tribunal exists for the purpose of auditing the findings of competent trial and circuit judges on such routine and time-consuming problems as presented by this case.

B. The Election Question.

The petition does not establish that the decision of the court of appeals is probably in conflict with applicable Arizona decisions. Even a cursory study of the Arizona cases cited by the petitioner discloses that the Arizona court has never undertaken to define the statutory election given to a workman by Section 56-949, A.C.A. 1939. The only case referred to in the petitioner's brief which even mentions this statute is *Moseley v. Lily Ice Cream Co.*, 38 Arizona 417, 300 Pac. 958. The questions presented here were neither raised by the pleadings nor decided by the court in the *Moseley* case. In truth, the entire rationale of that decision is predicated on the fact that Moseley, *with full knowledge of his rights,* made a valid election. If the dictum of the *Moseley* case has any value as a guidepost to the attitude of the Arizona court toward Section 56-949, it indicates a lack of sympathy for the rigid, technical rule now advocated by the petitioner.

Mr. H. S. McCluskey, who has been counsel for the Arizona Industrial Commission since our workman's compensation law was enacted, outlined the status of the Arizona law in a statement to the trial court as follows (R. 127):

> *"This is the first case of this character we have experienced in 24 years we have been in operation. So we have no case clearly in point on the right of rescission after election.* • • •"

We find it hard to believe that the petitioner seriously urges that the opinion of the court of appeals is in conflict with any rule enunciated by the Arizona Supreme Court.

C. The Court as Trier of the Jurisdictional Facts.

At the outset of this case, in the trial court, the petitioner, in furtherance of its motion to dismiss (R. 25), argued with considerable force that the court lacked jurisdiction over the subject matter of the litigation. At that time, the court considered this motion on the pleadings and on the depositions of the principal witnesses who later testified at the trial. Counsel for the petitioner asked the court to dismiss the cause by deciding that the plaintiff and defendant were co-employees, that plaintiff had elected workmen's compensation as his remedy, and that in either event, the Arizona Commission had exclusive jurisdiction over the subject matter. At that stage of the case, counsel for the petitioner subscribed wholeheartedly to the axiom cited by the Circuit Court in its opinion (R. 216) that "Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist." Having met with an adverse decision on this point, the petitioner has now repudiated its previous position and, ironically, seeks the intervention of this court's supervisory powers on the ground that it is a departure from "the accepted and usual course of judicial proceedings" for a federal court, sitting as trier to the facts, to determine whether the "conditions essential to the exercise of its jurisdiction exist."

ARGUMENT

I. Identical Employ.

The finding by the Court of Appeals (R. 217) that "the preponderance of evidence clearly sustains the implied finding of the district court that Sanderson and Porter were 'independent contractors' * * *" should preclude further

discussion of this issue. However, should this Court have any misgivings on the merit of this ruling, we direct attention to the

"RESPONDENTS' CONSTITUTIONAL ARGUMENT."

The respondent has previously taken the position, and urges here, that Sanderson and Porter are liable even if it is assumed that they were, in fact, fellow servants of Hubbell, for the reason that under the constitution of Arizona (Article 18, Section 6) an employee may sue a fellow servant whose negligence causes him harm. Here, in brief form, is the argument:

Premise One:

Under the common law action of negligence, a servant could, without limitations, sue a fellow servant for his negligent conduct. 57 *C.J.S.* "Master & Servant" 348.

Premise Two:

By Article 18, Section 6, of the Arizona constitution, the common law action of negligence is imbedded in the constitution and cannot be abrogated by statute or otherwise.

Premise Three:

Therefore, if the Arizona Legislature, by Section 56-949, A.C.A. 1939, intended to abrogate a workman's right to sue a negligent fellow servant (which intent respondent denies), the statute is unconstitutional.

Conclusion:

Assuming that Sanderson and Porter *were* actually fellow servants of Hubbell, they are still liable to him for their negligence.

The respondent's argument on this point is based on the Arizona Supreme Court's analysis of this constitutional provision in *Alabama Freight Co. v. Hunt,* 29 Ariz. 419, 242 Pac. 658. This argument would not be affected in the least by the fact that the common employer of both servants had workmen's compensation insurance at the time of the negligent act.

II. Election of Remedy.

RESTATEMENT OF FACTS AS TO ELECTION.

The respondent feels required to restate the essential facts on the election question, in order to correct serious omissions in the petitioner's statement of facts set forth in its brief at page 20:

Respondent John E. Hubbell was injured on June 17, 1949 (R. 103). He was under the influence of drugs for several weeks after the injury, and, in time, his right foot and the second, third, fourth and fifth fingers of his left hand were amputated. His memory is dim regarding the events of the first two or three weeks of his convalescence (Reporter's Transcript, pages 23, 24). On June 22, his employer reported the accident to the Arizona Industrial Commission (R. 170). The employer made no mention in this report of negligence by a third party (see question 19, R. 107). Some time prior to July 6, the Commission mailed to Hubbell or his wife an application for workmen's compensation (Reporter's Transcript, p. 34). There is no evidence in the record that the plaintiff or his wife requested that the Commission send them applications of any kind. Throughout, the Commission handled the case as though it was a routine employer-employee type accident (R. 158), and the Commission did not send to Hubbell or his wife the

election of remedy form (R. 168) which the Commission customarily sends out to employees injured by third parties (R. 158). Thus plaintiff did not know what his rights were when he signed the applications for compensation (R. 105, 106), and did not realize the necessity of choosing between compensation and suing Sanderson and Porter until after he had consulted counsel some seventy-five days after the accident (R. 109). When his attorneys advised him that he could sue the defendant as a negligent third party, he notified the Commission to make no further compensation payments, filed an election of remedy form with the Commission, and instituted the instant suit (R. 106, 108).

ESTOPPEL.

Can the petitioner, a negligent third party who is a stranger to the compensation act, argue that respondent Hubbell made a valid, binding election, or is this a matter which properly concerns only the respondent and the Arizona Commission? Respondent strenuously insists that a negligent third party may only interpose those defenses available to any party defendant in a common law negligence action. An excellent statement of this principle of law is contained in *Parkhill Truck Co. v. Wilson,* 190 Okla. 473, 125 P.2d 203:

> "The Workmen's Compensation Act was not enacted by the Legislature for the benefit and protection of a negligent third party nor does it purport to increase or decrease such third party's liability under the common law for negligence. *It is no concern of a negligent third party what the arrangement is between the injured employee on the one hand and his employer and insurance carrier on the other.*"

Counsel commends to the court the sound, realistic thinking which informs the *Parkhill* opinion. We submit that this case enunciates the broadest rule yet formulated to preserve the cause of action of a workman who is injured by a negligent third party, and perhaps foreshadows future decisions which will deny haven to negligent third persons who seek refuge in the statutes defining the relationship between workmen and their employers.

THE ARIZONA LAW.

We assert again that the election question is a matter of first impression in Arizona; for all their contrary protestations, this fact is implicit in the very arguments set forth in petitioner's brief. The election statute itself (Section 56-949, A.C.A. 1939) commands that a workman injured by a negligent third party *"shall elect"* his remedy. In view of this statute and Article 18, Section 6, of the Arizona Constitution, we find it difficult to comprehend the argument of the petitioner that the election conferred by the statute and confirmed by the constitution may be an involuntary, unwitting, or even accidental one. It is obvious from a reading of the opinion of the Court of Appeals that its decision was controlled in large measure by the construction placed on this constitutional provision by the Arizona court in the *Alabama* case, supra (R. 217). Counsel cannot agree with the petitioner that the Court of Appeals based its decision on *Johnson v. American-Hawaiian S.S. Co.*, 98 Fed. 2nd 847, although we believe that this is the only decision by a Federal court which contains an exhaustive analysis of the election question.

The *Pressley* case (cited on page 23 of petitioner's brief) will speak for itself. True, it may illuminate some aspects

of some of the questions which concern us here. However, on the facts cited by the petitioner, it is apparent that that case has several features which distinguish it from the case at bar.

III. The Jurisdictional Question.

PETITIONER ESTOPPED BY INVITED ERROR.

The Court of Appeals correctly assumed that the petitioner maintained in the District Court that the issues of election and identical employ were jurisdictional and triable to the court. In this regard we would call the attention of the court to the following: Paragraph VIII and the prayer of the defendant's answer (R. 61, R. 63); defendant's motion for summary judgment (R. 48, R. 55); the defendant's motion to dismiss (R. 25); defendant's argument to the trial court on its motion for an instructed verdict (R. 143); and petitioner's motion for judgment in accordance with motion for directed verdict (R. 84). The central idea advanced by these pleadings and the concomitant oral arguments was that the District Court had no "power" to hear the case, exclusive jurisdiction being vested in the Commission.

Having invited the trial court to try the jurisdictional facts, the petitioner should now be estopped from alleging error insofar as the trial court's decision on these matters was concerned. The appellate rule of invited error is a salutary one and we feel that it should properly be applied in this case. See 5 *C.J.S.*, Appeal and Error, Section 1503.

ARGUMENT ON THE MERITS.

At the threshold of the case the trial court had to determine whether it or the Arizona Commission had jurisdiction over the subject matter involved. Obviously (aside

from respondent's constitutional argument) if the plaintiff and defendant were fellow servants, or if the plaintiff had bound himself to accept compensation, the District Court could not entertain the case. The judge proceeded to determine these facts and, finding against the petitioners, overruled their motions to dismiss and for summary judgment and proceeded with the trial of the cause. The facts of the Oklahoma case cited by the Court of Appeals (*Dolese Bros. v. Tollett,* 162 Okla. 158, 19 P.2d 570) are on all fours with the instant case on this point. The Oklahoma election statute is, for all purposes, identical with Arizona's Section 56-949, A.C.A. 1939. Under these circumstances, the reasoning of the Oklahoma court in this case should be highly persuasive:

> "A trial court is required to determine the legal question of whether or not it has jurisdiction of the subject matter of an action presented to it for determination. If it does not have jurisdiction of the subject matter of the action, it cannot legally impanel a jury to submit any question to a jury. It is neither authorized or required to submit to a jury the question of whether or not it has jurisdiction of the subject matter of an action."
>
> (See also *Freire v. Matson Nav. Co.,* 109 P.2d 1022.)

IV. Ownership of the Cause of Action.

As we understand it, the petitioner contends that the respondent should have asked the Commission to have his apparent election set aside before filing suit. In seeking to ascertain whether respondent Hubbell elected his remedy, the inquiry is really directed to the question "What happened to his cause of action?" If he made a valid binding election, his cause of action would pass to the Commission:

but, on the other hand, if he was not granted a reasonable election he still retained ownership of his cause of action against those whose negligence caused his injury, and was the only person who could properly file a claim against the negligent third party. Neither an apparent election nor any operation of statute could divest him of his cause of action; only a voluntary choice with full knowledge would satisfy the statutory command that "he shall elect * * *."

V. Petitioner's Right to a Jury.

Even if the petitioner was wrong in the trial court, and the issues of election and identical employ were not triable to the court, the judgment must still be sustained, as we have urged heretofore, on the ground that there was no conflict in the evidence on these issues. We particularly invite the court to compare the testimony of respondent's witnesses Lovell and Fields with that of petitioner's witnesses Dunn, Broockmann, Snider and Sanders on the issue of identical employ. We submit that there is no conflict or contradiction between these witnesses on the vital question as to who retained actual supervision and control of the details of the work. In such case, the question of employment status is always a question of law and not one of fact. 56 *C.J.S.*, "Master & Servant," pp. 48, 92; *DeBord v. Proctor & Gamble Distributing Co.*, 58 F. Supp. 157, affd. 146 F.2d 54.

CONCLUSION

On the face of the record, it is clear that this case was carefully and fully considered in both of the lower courts.

No "special or important reasons" appear in the petition which would warrant issuance of the writ.

There is no showing in the petition that the Court of Appeals decided any *important* question of local law in a way probably in conflict with applicable Arizona decisions.

The reasons relied on for the allowance of the writ are so unsubstantial as to justify the conclusion that the petition was sued out only for delay.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be denied, and that damages be awarded to the respondents in accordance with Rule 30, Section 2. (See *Southern R. Co. v. Gadd,* 233 U.S. 572, 58 L.Ed. 1099, 34 S.Ct. 696.)

Respectfully submitted,

J. NICHOLAS UDALL,
Luhrs Tower Building,
Phoenix, Arizona,

UDALL & UDALL,
By STEWART L. UDALL
408 Valley National Building,
Tucson, Arizona,
Attorneys for Respondents.

20

Office-Supreme Court, U. S.
FILED
SEP 1 1951
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 76

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,
Petitioners,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,
Respondents,

and

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,
Intervenors Below.

Petitioners' Reply Brief

GERALD JONES,
OF CONNER & JONES,
303-7 Valley National Building,
Tucson, Arizona,
Counsel for Petitioners.

PARKER PRINTING COMPANY, 150 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

Page

Pressley Decision 1

TABLE OF AUTHORITIES CITED

CASES Page

S. H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 P.(2) 939 3

STATUTES

Arizona Code Annotated, 1939, Section 56-949 2

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 76

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,

Petitioners,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Respondents,

and

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,

Intervenors Below.

Petitioners' Reply Brief

At the Clerk's suggestion we denominate this "Reply Brief," but it is presented so that the court will be advised of the opinion of the Arizona Supreme Court handed down on July 13, 1951, in the *Pressley* case, to which reference will be found in Petitioners' Brief in support of the petition for certiorari at pages 21-24. A copy of the opinion is appended hereto.

None of the parties to the *Pressley* case was satisfied with the opinion and all of them have filed petitions for rehearing; and it is not likely that final action will be taken by the Arizona Supreme Court until it convenes in middle September and gives the several petitions consideration.

Should the opinion stand as written, it definitely holds against petitioners in so far as their contention that the opinion of the Court of Appeals misinterpreted the Arizona decisions as to the elements of an election of remedies by an employee is concerned; and that part of Reason No. II found on Page 7 of Petitioners' Brief reading "and the court of appeals was in error in holding that no election resulted unless appellee had (1) Knowledge of the alternative remedies available and (2) Knowledge that the law precluded him from pursuing but one of such remedies" could not longer be maintained.

On the other hand, we submit that No. II is supported by the opinion in so far as petitioners contend (see pages 21 to 24 of their brief) that the failure of appellee to pursue the remedies afforded him by the Workmen's Compensation Act left the decision of the Commission against his attempted election binding on the courts. It will be noted that the Arizona Supreme Court concludes that the right of election is governed by Section 56-949 of the Arizona Code. That section is a part of the procedure for the determination of the injured employee's rights where third parties may be involved and it grants the commission a voice in any compromise negotiations that may arise between the injured employee and third parties.

The Arizona Supreme Court concludes its opinion with a consideration of the issue whether the Commission had correctly decided that an election had been made by Press-

ley to accept compensation in lieu of a claim against the third party, and held that the Commission erred in holding that, irrespective of Pressley's knowledge of his rights and intent to make a choice of one as against the other remedy, he had nevertheless made a binding election to accept compensation benefits. The award was set aside and the matter in effect remanded to the Commission to decide as an issue of fact whether in claiming compensation Pressley had acted with full knowledge of his alternative rights.

No other conclusion from this and other Arizona decisions cited in Petitioners' Brief appears reasonable except that an injured employee, having claimed or accepted compensation, must petition the Commission for leave to change his apparent election and apply to the Arizona Supreme Court for certiorari to the Commission if the latter reject his effort. Failing that, the Commission's denial has the force of a judgment which the courts may not annul. See particularly *S. H. Kress & Co. v. Superior Court,* 66 Ariz. 67, 182 P.(2) 931.

Nothing in the opinion adversely affects the other reasons advanced by petitioners for certiorari.

Petitioners will advise the court of further action by the Arizona Supreme Court in the *Pressley* case.

Respectfully submitted,

GERALD JONES,
OF CONNER & JONES,
303-7 Valley National Building,
Tucson, Arizona,
Counsel for Petitioners.

(Appendix follows)

APPENDIX

In the Supreme Court of the State of Arizona

No. 5431

Frank E. Pressley,
Petitioner,

vs.

The Industrial Commission of Arizona, and J. J. O'Neill, Fred E. Edwards and B. F. Hill, members of The Industrial Commission of Arizona,
Respondents

OPINION

Appeal by Certiorari from an Award of
The Industrial Commission of Arizona

AWARD SET ASIDE

HALL, CATLIN & MOLLOY
of Tucson,
Attorneys for Petitioner

H. S. MCCLUSKEY,
Attorney for Respondents,
The Industrial Commission of Arizona;

ROBERT E. YOUNT and DONALD J. MORGAN,
of Counsel

RICHEY & HERRING,
of Tucson and Douglas,
By NORMAN HERRING,
Attorneys, Amicus Curiae

DE CONCINI, J.:

Petitioner, Frank M. Pressley, on March 9, 1950, was in the employ of Pioneer Constructors, a firm engaged in construction of a sewer line in Tucson, Arizona. At about one o'clock, p.m. that day he was seriously injured by a gas explosion in a manhole where he was working. He was taken to a hospital, where he remained until April 15th, and was finally discharged by his physician on June 9th. The initial report of accident required by law was filed with the Industrial Commission on March 13th, together with the report of the attending physician. On March 22nd a workman's claim for compensation was filed with the commission, signed "Frank Pressley, by E. K. Kettenback, M.D." Both the doctor and Pressley testified that the latter never requested Dr. Kettenback to sign the application or to file the same.

On March 29th the commission entered findings that petitioner suffered an injury by an accident arising out of and in the course of his employment, and ordered that Pressley was entitled to compensation under the Act, and accepted responsibility for the medical benefits and compensation provided thereby. On the same day, the commission wrote Pressley that his claim for compensation was not properly signed and enclosed application forms partially filled in by the commission. Pressley signed these forms on March 31st and returned them, but did not fill in any of the remaining blanks, among which were questions inquiring if any third party was liable for the accident. They were filed with the commission and thereafter it paid, for medical benefits, the sum of $859.00. On April 5th the commission sent petitioner a check for compensation which was returned by him on

about April 28th. On May 1st the petitioner executed, on a form provided by the commission, an election of remedies as follows:

> "2. Elects to proceed under the provisions of Section 56-949, Arizona Code 1939, as amended and supplemented, against said third party and to herewith file claim against said defendant employer and defendant insurance carrier only to the deficiency, if any, between the amount actually collected from said third party and the compensation provided or estimated under Articles 9 and 12, Chapter 56, Arizona Code 1939, as amended and supplemented; and also agrees not to compromise any action or cause of action for personal injuries, except with the approval of the Industrial Commission of Arizona, as provided by said laws."
>
> * * * * * * *
>
> "The said claimant, in making said election of remedies, under 2 or 3, consents and agrees to all of the provisions of the Arizona Workmen's Compensation Law and the Arizona Occupational Disease Disability Law in the matter of accident benefits, and compensation; and agrees to follow any competent and reasonable surgical treatment, or medical aid, found to be necessary by The Industrial Commission of Arizona for the relief, cure, or improvement of the condition of said claimant."

and on May 6th filed a petition containing, among other things, the following:

> "3. That your petitioner did on March 31st, 1950, sign a 'Workmen's Claim for Compensation for Injuries or Occupational Disease' and a 'Workman's Supplemental Claim for Compensation' which instruments were duly filed with the Commission and are hereby referred to for all purposes.

> "4. That at the time your petitioner signed the foregoing instruments he was in complete ignorance of his right to bring a civil action against the said Tucson Gas, Electric Light & Power Company for the aforesaid injuries and was completely ignorant of the fact that his signing and filing the aforementioned claims would mitigate against any rights which he might have as a result of being so injured, that at the time the aforesaid claims were executed by him he was in a hospital critically ill and suffering grievous pain and suffering; that at the time said claims were executed and at all times prior thereto he was without any legal advice whatsoever; and that in filing the aforesaid claims he had no intention of waiving any rights which he might have against the Tucson Gas, Electric Light & Power Company arising as a result of said injuries or for any other reasons."

and asked that his medical benefits be continued but that his claim for compensation be held in abeyance pending final decision of his suit against the Tucson Gas, Electric Light & Power Company under section 56-949, supra. On June 12th the commission made an award retaining jurisdiction of the case and in effect denied petitioner the right to sue said third party.

A petition for rehearing was duly filed and on September 5th the commission affirmed the previous award. Application was made for a writ of certiorari to the supreme court and the writ was granted. The matter is now before the court on the answer to the writ.

The situation presented is somewhat peculiar. Petitioner claims the commission is primarily liable only for *accident benefits* but secondarily liable for compensation benefits under section 56-949, supra, and then only to the extent he

fails to recover from a third party as much as he would be entitled to recover from the commission under the Act; while the commission insists that it is primarily liable for both accident benefits and compensation to the full extent of the Act.

The questions involved require a construction of various sections of the compensation Act and of the constitution of Arizona. In construing them there are certain principles which we must always keep before us: They must be considered as a whole so as to effectuate the purpose of the legislature and of the people as set forth in the constitution and the Act, and, so far as statutes are concerned, are to be construed liberally and remedially. Ocean Accident & Guarantee Corp. v. Industrial Commission, 32 Ariz. 265, 257 P. 641. The purpose of the compensation Act and of article 18, section 8, of the constitution, as amended, was to dispense, so far as possible, with litigation between employer and employee and to place upon industry the burden of compensation for injuries caused by the employment. Sims v. Moeur, 41 Ariz. 486, 19 P.2nd 679.

In passing upon the assignments of error, we think it best to dispose of them according to the legal questions raised thereby rather than the formal assignments as presented in the briefs.

The first question is whether petitioner is entitled to accident benefits even though he elects to sue a third party whom he claims is responsible for the accident.

Section 56-930, A.C.A. 1939, provides:

> "*Construction of terms.* * * * 'Compensation' shall mean the compensation and benefits provided herein; * * *"

At first blush this section would appear to indicate that the term "compensation" was intended to include the term accident "benefits" and that the latter are a component of the former. An examination of the Act in its entirety renders this interpretation of section 56-930, supra, incongruous with its subsequent provisions. Section 56-938(a), A.C.A. 1939, details the various benefits to which every injured employee is entitled, such as surgical and hospital treatment, and nursing and medical supplies, and terms them "accident benefits." Subsection (b) sets up a separate accident benefit fund and provides that the compensation fund shall not be liable for such benefits. Sections 56-940, 941, and 942, A.C.A. 1939, further provide for the operation and administration of the accident benefit fund. From these sections, as from the entire Act, it can be seen that the legislature, notwithstanding section 56-930, supra, intended to treat "compensation" and "accident benefits" as two separate and distinct entities, independent of one another. That the legislature so intended to differentiate between compensation and accident benefits was established by this court in the case of Paramount Pictures v. Ind. Comm., 56 Ariz. 217, 106 P.2d 1024. After a careful study of all of the various sections of the Act, particularly sections 56-920, 931, 932, 936, 938, 940 and 942, we hold that an employee who elects to sue a third party under section 56-949, supra, is nevertheless entitled to receive "accident benefits" from the commission. This is so because section 56-938, supra, in particular provides that *every* injured employee shall receive "accident benefits." No distinction is made between employees who elect to pursue their remedy against a third party under section 56-949, A.C.A. 1939, and

those who elect to receive compensation. The only logical assumption, then, is that the legislature intended that all injured employees should receive accident benefits including those who elect to pursue a third party. Therefore section 56-950, supra, which provides that an employee who makes an application for an award waives his right to pursue a third party, by necessity refers to an application for an award for compensation and not to an application for an award for accident benefits. Under section 56-938, supra, an application for an award for accident benefits is not a waiver of the employee's right to pursue his remedy against a third party.

The second question is the one raised by amicus curiae, that an injured employee retains both the right of full recovery under the Act and also the common law action of negligence under article 18, section 6, of the constitution, and that sections 56-949 and 950, supra, are therefore unconstitutional. This court discussed the constitutionality of section 56-949, supra, in Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 242 P. 658, and Moseley v. Lily Ice Cream Co., 38 Ariz. 417, 300 P. 958, and we see no reason for departing from the rule as laid down in those cases to the effect that there can be but one recovery of accident benefits and compensation for an injury, as provided by the Act, but that the injured party must be given a *reasonable election* of the different remedies provided by the constitution and the statutes.

To sum up, the total of petitioner's recovery, if he falls under the Act at all, cannot be *less* than the "accident benefits" and the compensation fixed by the Act, and if he sues the third party, *may* be more. The award of the commis-

sion should have provided for payment of medical expenses in the same manner as under the ordinary case. So far as the claim of petitioner to delay the fixing of the amount of compensation to be paid by the commission is concerned, we think that in view of the provision of the Act that a claim must be filed within a year from date of injury, and considering that it usually takes one year or more to prosecute a claim for negligence through our courts, was very proper even though not necessary for petitioner to present his request for delayed action on this point; and that this was not an application for an award of the character referred to in section 56-950, supra, as barring the right to sue the third party.

It was and is the duty of the commission to continue the payment of medical benefits as needed. In view of this fact, the contention of the commission that plaintiff was estopped from changing his election because the interest of parties such as doctors, nurses, hospitals, etc. would be affected by the change, is without support in the law.

We next consider the question of whether section 56-950, supra, applies to an election made under section 56-949, and if so, whether 56-950 is constitutional. Petitioner claims it does not apply to an election to sue or not to sue a third party under 56-949, supra, but to an option to sue an employer under article 18, section 6 of the constitution or to accept compensation under the Act. We hold that the right to sue an employer under article 18, section 6, supra, must be exercised before the injury by rejecting the Act at the time of the employment. Article 18, section 8 of the constitution, as it now appears, was adopted by the people after the adoption of article 18, section 6 and there-

fore, so far as the two may be inconsistent, section 8 prevails over section 6. Section 8, supra, provides that an employee at the time of entering his employment has the option to either come under the Act or to reject the Act and reserves the right to sue his employer under section 6, supra. However, if an employee who has not rejected the Act is injured by the negligence of a third person, he may elect the remedy given him by the Act and take compensation or he may sue the third party under section 56-949, supra. We hold that section 56-950, supra, which provides what constitutes an election, applies to the election to pursue a remedy against third parties under section 56-949, supra, and not otherwise.

The question then arises whether or not section 56-950, supra, affords the employee the "reasonable election" of remedies required by our holdings in the Alabam and Moseley cases, supra; for unless it does, the section is clearly unconstitutional. In cases like this an election is a waiver of one right and the acceptance of another in lieu thereof, and we hold that to be binding the election must be with knowledge (1) of the alternative remedies, and (2) that the acceptance of one waives the right to the other. Taylor v. Hubbell, 188 F.2nd 106, construed article 18, section 6 of the Arizona constitution to give an injured employee the right to sue a third party. We consider such employee to have that right by virtue of section 56-949, supra, under article 18, section 8; however that case is authority for what constitutes a binding and valid election. See also Graybill v. Corlett, 60 Colo. 551, 154 P. 730; Craig v. Meriwether, 84 Ark. 298, 105 S.W. 585, 28 C.J.S., Election of Remedies, section 24. With this construction, section 56-

950, supra, is constitutional. If the applicant does not have this knowledge, whether his ignorance be one of law or fact, he has in fact made no binding election. Gardner v. Gauthier, 101 Vt. 147, 141 Atl. 682. This desire for a change must of course be raised by the pleadings in the case, Moseley v. Lily Ice Cream Co., supra, and the petitioner must sustain his claim of lack of knowledge by reasonable evidence.

The award of the commission dated June 12th denying petitioner the right to sue the third party, provided:

> "The Commission having reviewed the record and the law in such cases finds that under the provisions of Section 56-930 and 56-949 and 56-950, Arizona Code Annotated, 1939, as amended, that the above named applicant, *having made application for an award for compensation and having accepted benefits* under the Workmen's Compensation Law, *has waived any right to exercise any option instituting proceedings in any court* and that the Industrial Commission is therefore without jurisdiction to grant the prayer of the claimant and retains jurisdiction under the law." (Emphasis supplied.)

The underlined portions show clearly that the commission held as a matter of law that the application for compensation by petitioner dated March 31st amounted to an election which precluded him from suing a third party as provided in section 56-949, supra.

It can be seen, in the light of the foregoing, that in order for petitioner's application for an award to be a binding election upon him, he must have had knowledge of his alternative remedy to pursue the third party. The only evidence that the petitioner was without that requisite knowl-

edge was his own testimony. Since the rule in this jurisdiction is that the trier of fact may completely disregard the testimony of an interested witness, the commission could have disbelieved the petitioner. It is clear however that the commission did not base its award on this fact but, rather it found as a basis for its award, that in making an application for that award petitioner had, as a matter of law, precluded himself from pursuing his remedy against a third party. That conclusion is not justified by the Workmen's Compensation Act, as we interpret it. The award, therefore, cannot stand.

Award Set Aside

Evo De Concini
Justice

Concurring:

Levi S. Udall
Chief Justice

R. C. Stanford
Justice

M. T. Phelps
Justice

Arthur T. LaPrade
Justice